STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Shapiro, P.J., and Hoekstra and Whitbeck, JJ.)

JOHN TERBEEK,

Plaintiff/Appellee,

V

CITY OF WYOMING,

Defendant/Appellant.
_____/

Supreme Ct. Case No. 145816
Court of Appeals No. 306240
Lower Court No. 10-11515-CZ

BRIEF *AMICUS CURIAE* OF THE CITY OF LIVONIA IN SUPPORT OF THE CITY OF WYOMING

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STATEMENT OF QUESTIONS FOR REVIEW

I. DOES THE MICHIGAN MEDICAL MARIHUANA ACT PREEMPT THE ZONING ORDINANCE IN THIS CASE?

The Circuit Court did not definitively answer this question.

The Court of Appeals said "Yes."

Appellee and *Amicus Curiae* City of Livonia say "No."

II. DOES THE MICHIGAN MEDICAL MARIHUANA ACT SURVIVE SUPREMACY CLAUSE ANALYSIS?

The Circuit Court said "No."

The Court of Appeals said "Yes."

Appellee and *Amicus Curiae* City of Livonia say "No."

STATEMENT OF FACTS

Amicus Curiae adopts Defendant-Appellant's Statement of Facts, noting additionally that Defendant-Appellant observed the procedural requirements for zoning ordinance amendments when adopting the ordinance in question (Defendant-Appellant's Brief at 7), and that Plaintiff-Appellee was pursuing his MMMA-compliant land use prior to adoption of the ordinance, so he enjoys grandfathered status. (Defendant-Appellant's Brief at 12.)

INTRODUCTION

This case challenges the validity of a zoning ordinance which says that "Uses that are contrary to federal law, state law or local ordinance are prohibited."[1] In other words, the ordinance sets forth the commonsense rule that land in the City of Wyoming cannot be used to do anything which is already illegal. And yet, this seemingly obvious proposition is under fire. Indeed, the ordinance has already been struck down by the Court of Appeals in this case. Truth, it seems, has assumed its accustomed place on the scaffold.[2]

One might well ask how things got to this point. Plaintiff-Appellee announced his intention to violate the U.S. Controlled Substances Act ("CSA"), 21 USC 801, *et seq*, but ostensibly feared that in so doing, he would run afoul not of the vast power of the federal government, but of the comparatively modest resources of the City of Wyoming. He therefore asked the Michigan court system to strike down Wyoming's ordinance as a violation of the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421, et seq.

Plaintiff-Appellee had no luck at the circuit court level, where Judge Dennis B. Leiber chose rather to strike down the MMMA as an attempt to undermine the CSA in violation of the Supremacy Clause of the U.S.

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[1] See paragraph 3 of Statement of Facts, Defendant-Appellant's Brief on Appeal at vi. *Amicus Curiae* City of Livonia adopted virtually identical language in Zoning Ordinance Section 3.08 (See Exhibit A attached). Having prevailed against a parallel American Civil Liberties Union challenge to its ordinance (See Exhibit B attached), *Amicus Curiae* City of Livonia seeks to prevent vicarious invalidation of its ordinance via the instant case.

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[2] James Russell Lowell, "The Present Crisis," St. 8, http://en.wikiquote.org/wiki/James-Russell.Lowell#The-Present-Crisis-281844.29.

Constitution. US Const Art IV, cl 2. So Plaintiff-Appellee approached the Court of Appeals, where he fared better. Apparently determined, no matter what the cost, to vindicate the voter-approved MMMA, the Court of Appeals reversed the Circuit Court, ruling both that the MMMA trumps the local ordinance, and that the CSA does not, in fact, trump the MMMA. See *ter Beek v City of Wyoming,* 297 Mich App 446; 823 NW2 864 (2012).

So now this Court is the sole hope in the whole State of Michigan for the unassuming ordinance which merely prohibits land uses which are already illegal. This brief aims to show that the ordinance does not have the faults wrongly attributed to it by Plaintiff-Appellee and the Court of Appeals, and is, in any event, not preempted by the MMMA. Perhaps more importantly, the MMMA – as construed by Plaintiff-Appellee and the Court of Appeals – confers a state law right which is utterly incompatible with both the CSA and the Supremacy Clause. Because it is possible, if one rejects the extreme position staked out by Plaintiff-Appellee and the Court of Appeals, to construe the MMMA so that it conflicts with neither the ordinance nor the Constitution, the ultimate question for this Court is whether saving the MMMA is worth the effort. Either way, if commonsense is to prevail, the Court of Appeals decision in this case must be overturned.

LAW AND ARGUMENT

I. THE MICHIGAN MEDICAL MARIHUANA ACT DOES NOT PREEMPT THE ZONING ORDINANCE IN THIS CASE.

A. As a Zoning Ordinance, the Challenged Provision does not Effectuate a Complete Ban on MMMA-Compliant Activity.

To understand this case, it is critical to remember that the ordinance in question is a *zoning* ordinance, adopted pursuant to the Michigan Zoning Enabling Act ("MZEA"), MCL 125.3101, *et seq.* Zoning ordinances differ in profound ways from ordinary criminal codes prohibiting the marijuana trade. For a start, the gravamen of a zoning violation is the illegal use of *land.* MCL 125.3201(1). So, for example, if a police officer pulls over a motorist and discovers marijuana in the motorist's car, the officer does not – without more – have probable cause to suspect a zoning violation. The motorist may have used his *car* illegally, but no evidence points to an illegal use of any particular piece of land.

To carry the analysis further, even if the officer – in an excess of zeal – charges the motorist with violating the zoning ordinance, the motorist could seek relief from prosecution by an avenue not open to violators of criminal codes. By petitioning the zoning board of appeals ("ZBA"), per MCL 125.3601, *et seq.*, he could stave off criminal proceedings indefinitely, because prosecution would be stayed pending the ZBA's resolution of the appeal. MCL § 125.3604(3). If the ZBA granted the petition, prosecution would likely end; it could only continue if the prosecutor successfully appealed the ZBA's decision to the local circuit court per MCL 125.3606. Even if the ZBA did not grant the petition, the motorist could

still avail himself of that same right to appeal to circuit court. This is true whether the motorist's marijuana was "medical" or not, and without regard to whether the motorist knew the marijuana was in the car. Indeed, so long as the motorist was only charged with zoning violations, he could use his appeal rights to avoid prosecution even if he was smoking the marijuana at the time of the stop. Zoning ordinances cannot address marijuana use in the traditional sense of the word "use."[3]

Moreover, under MCL 125.3208, even an open and notorious violator could escape prosecution for the zoning infraction if he could show that he was making the same marijuana-related use of the land before the locality adopted the zoning provision cited against him. Prior nonconforming land uses enjoy protection from after-arising zoning regulations. This defense, like the possibility of relief from the ZBA, is unavailable in marijuana cases outside the zoning context, regardless of the availability of an MMMA defense. And it is at this point that the hypothetical meets the facts in the instant case. Plaintiff-Appellee asserted his prior nonconforming use status in the courts below, and Defendant-

[3] Appellee claims that "use of medical marijuana is [a] violation of the [Wyoming] zoning code," citing paragraph 30 of Appellant's Answer to First Amended Complaint. Appellee's Brief at 9. In hindsight, this may appear to be inartful drafting brought on by the expansive definition of "use" in MCL 333.26423(f). But it is not always easy to predict, in the early stages of litigation, which shades of meaning will later be deemed critical to the case. And it should be recalled that no party before the court has been charged with smoking or even possessing marijuana in violation of the zoning ordinance. Rather, the case is postured for an up-or-down vote on the entire universe of possible applications of the ordinance – indeed, of all zoning ordinances – to MMMA-compliant behavior.

Appellant has acknowledged that he meets the criteria. (See Defendant-Appellant's Brief on Appeal at 12.)[4]

Beyond the get-out-of-jail-free aspect of the prior nonconforming use rule, MCL 125.3208 also means that even a complete ban on new MMMA-compliant land uses is not a total prohibition so long as there is some prior nonconforming MMMA-compliant use in town. *Adams Outdoor Adver., Inc. v. City of Holland*, 463 Mich. 675, 685; 625 N.W.2d 377, 2001 Mich. LEXIS 842 (2001).

The Court of Appeals failed, however, to consider these realities, observing that the zoning ordinance "does not attempt to regulate lawful conduct, but attempts to *completely ban* the medical use of marijuana on . . . the authority of the CSA, a federal criminal statute." *ter Beek, supra*, at 456 (emphasis added). Leaving aside for the moment the curious suggestion that violating a "federal criminal statute" constitutes "lawful conduct," the court evidently forgot at least two potential exceptions to the "ban" in this ordinance: 1) any prior nonconforming use, and 2) the case of the hypothetical motorist described above. In neither case is medical marijuana use prohibited by the zoning ordinance. And the ban can also be set aside, in individual cases, by the ZBA.[5]

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[4] Note the fascinating implications for standing in this case. One wonders just exactly what fear of prosecution fuels Appellee's claim to standing if he enjoys grandfathered status under the MZEA.

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[5] The availability of variances under a zoning ordinance may support a finding that an ordinance is not overly restrictive on its face.

Lake Nacimiento Ranch Co v San Luis Obispo Co, 841 F.2d 872, 877 (CA 9, 1987, amended 1988), quoted in *Frericks v. Highland Twp., 228 Mich. App. 575, 596;* 579 N.W.2d 441 (1998).

The upshot, then, is that both Plaintiff-Appellee (see, e.g., Appellee's Brief at 19) and the Court of Appeals, *ter Beek, supra*, at 456, have been laboring under a severe misconception. The ordinance in question does *not* operate as a flat ban on MMMA-Compliant conduct.

B. Citywide Zoning Regulations, such as the Ordinance before the Court, are Authorized by the MZEA.

The Court of Appeals also seemed oddly troubled by the fact that the ordinance in question affects the entire city. "We note that this is not a case in which zoning laws are enacted to regulate in which areas of the city the medical use of marijuana as permitted by the MMMA may be carried out." *Ter Beek, supra*, at 456, n.4. But the ordinance in *Adams, supra*, was citywide, and that fact did not noticeably trouble either the Court of Appeals or this Court. See also, e.g., *Yankee Springs Twp v Fox*, 264 Mich App 604; 692 NW2d 728 (2004). After all, whether a given rule has citywide applicability or not,

> '"[Z]oning ordinances . . . are classified as general policy decisions which apply to the entire community."')

Greater Bible Way Temple v City of Jackson, 478 Mich 373, 389-390; 733 NW2d 734 (2007), quoting *West v City of Portage*, 392 Mich 458, 469; 221 NW2d 303 (1974). Under MCL 125.3201(1), an entire city could be in a single zoning district, meaning *all* zoning regulations would be citywide.[6]

[6] Appellant accuses Appellee of "labeling" the subject ordinance a "'zoning regulation,'" Appellee's Brief at 16, 19, as if the zoning ordinance "label" were a ruse masking some dark purpose. But Appellee met the cumbersome procedural requirements to adopt this regulation as part of its zoning code – Defendant/Appellant's Brief on Appeal at 7 – and MCL 125.3407 provides that any ordinance thus adopted gives rise to injunctive relief whether or not it is "labeled" a "zoning ordinance."

It is only to be expected that the city planning process on which zoning is based would identify some things which are not desirable in any part of a community. The only reason a citywide regulation would be problematic under the MZEA is the rule against exclusionary zoning, codified by MCL 125.3207. That section says

> A *zoning* ordinance or zoning decision *shall not have the effect of totally prohibiting the establishment of a land use* within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, *unless* a location within the local unit of government does not exist where the use may be appropriately located or *the use is unlawful.*

(Emphasis added.) Obviously, the ordinance in question here is bullet proof against claims of exclusionary zoning; by its terms the ordinance provision applies *only* to unlawful uses.[7]

A zoning ordinance provision like the one under consideration gives cities an additional tool in combating criminal enterprises – it declares all such operations to be zoning violations. Under MCL 125.3407, a zoning violation is a nuisance per se, which courts are instructed to abate. Surely such a tool is useful and appropriate in any zoning district. It therefore makes sense to give this ordinance citywide application. After all, in which district should uses prohibited by federal, state or local law be permitted?

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[7] Nor is the ordinance provision in question limited to marijuana-related uses. *Amicus Curiae* City of Livonia recently cited an identical zoning regulation in turning away a proposed Internet Sweepstakes Café. The business in question is prohibited by MCL 750.372, so use of real property for such an operation is prohibited by the ordinance language under consideration here. The same could be said for houses of ill repute, after-hours or unlicensed liquor purveyors and other illegal businesses.

C. Wyoming's Ordinance Does Not Violate the Immunity Conferred by the MMMA.

The availability of civil remedies for zoning ordinance violations under MCL 125.3407 has Plaintiff-Appellee using the "S word," i.e., "sophistry." Appellee's Brief at 22. Specifically, Plaintiff-Appellee claims it is "sophistry" to argue that an injunction is not a penalty.

The reason Plaintiff-Appellee makes this charge is that several subsections of Section 4 of the MMMA, MCL 333.26424, confer on qualifying patients and their various assistants immunity from

> arrest, prosecution, or penalty in any manner, or deni[al of] any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau

for MMMA-compliant marijuana-related activities. See, e.g., MCL 333.26424(a). If Wyoming's ordinance can be harmonized with this grant of immunity – by, for example, recognizing that injunctive relief under MCL 125.3407 does not violate the MMMA's rule against penalties for medical marijuana use – Plaintiff-Appellee's cause is lost.

This means that Plaintiff-Appellee's cause is lost.

In the first place, the mere fact that Plaintiff-Appellee cannot be punished for the medical use of marijuana does not mean he is immune from punishment for any crime he might commit while using marijuana. This point was made in *US v Hicks*, 772 F Supp 2d 829 (Ed Mich, 2010):

> [T]his is not a prosecution for possession of marijuana. Instead, it is a prosecution for alleged violations of Defendant's supervised-release conditions[.]

Hicks, supra, at 834.

Though there were any number of reasons that the MMMA was no help to the *Hicks* defendant, the most pertinent reason for present purposes is that although he was being penalized, the penalty did not violate the MMMA because he was not being punished for medical use of marijuana alone. He was being penalized for "using" marijuana in violation of his supervised release order. The analogy to Wyoming's ordinance is obvious: if a violator is punished, he is punished for his illegal land use, not his marijuana "use."

Hicks also illustrates the fact that what is immunized or downright innocent conduct in one context may be sanctionable in another. This is not a violation of the underlying immunity; it is a matter of the immunized person wandering out of bounds. Another example of this phenomenon is MCL 600.2950, pursuant to which the exercise of the Constitutionally protected right of association becomes a crime after a personal protection order is entered. So it is with the Wyoming ordinance in this case. Plaintiff-Appellee remains free to make medical use of marijuana, but he had better consult the local zoning ordinance before making any land use decisions.[8]

In short, Plaintiff-Appellee's immunity from "penalty in any manner" for medical marijuana use does not extend to violations of court orders or

[8] If the immunity conferred by the MMMA frees Plaintiff-Appellee from the strictures of Wyoming's zoning ordinance, it will be impossible for any community to regulate MMMA-compliant activity through zoning. If there is no difference, for MMMA purposes, between prosecuting an illegal land use and prosecuting marijuana use, then no zoning restriction – be it ever so prudent and narrowly tailored – can be enforced against one who legitimately claims MMMA immunity. If "penalty in any manner" includes the penalty for violating a zoning ordinance, it includes all zoning ordinances. That is what "any" means.

land use laws or any other crime not addressed by the MMMA. So it does not extend to Wyoming's ordinance in this case

Besides that, the MMMA does not confer immunity from injunctions because an injunction is not a penalty. An injunction is "a court order commanding or preventing an action[.]" Black's Law Dictionary (7th Ed), p. 788. Plaintiff-Appellee is correct in saying that punishment may follow the violation of an injunction, Appellee's Brief at 22, owing to the court's inherent power to enforce its orders. See, e.g., Draggoo v Draggoo, 223 Mich App 415, 428; 566 NW 2d 642 (1997); MCL 600.611. But injunctions in and of themselves are no more punitive than laws and orders generally; one who complies with the law, order, or injunction need not fear any penalty.

Moreover, immunity from one remedy does not mean immunity from all remedies, and immunity from "penalty" does not mean immunity from injunctions, such as the injunction available to Wyoming under MCL 125.3407. As this Court recently said,

> [I]n some instances, a . . . civil wrong [on the part of a governmental entity] might exist, but instead of seeking compensation to remedy the harm, the plaintiff elects some other remedy, thus rendering governmental immunity inapplicable . . . . See *Lash v Traverse City*, 479 Mich 180, 196; 735 NW2d 628 (2007) (recognizing that governmental immunity barred . . . monetary damages for an alleged statutory violation, but noting that the plaintiff could . . . seek . . . declaratory or injunctive relief); *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 152 n 5; 422 NW2d 205 (1988) (opinion by BRICKLEY, J.) ("Generally, we do not view actions seeking only equitable relief, such as abatement or injunction, as falling within the purview of governmental immunity."),

> overruled on other grounds by *Pohutski v City of Allen Park*, 465 Mich 675 (2002).

In re BRADLEY ESTATE, ___ Mich ___; ___ NW2d___(2013) 2013 Mich. LEXIS 1122 at 31-32. In the cases alluded to in *Lash* and *Hadfield*, the court's order enforcing the private party's rights cannot be said to *punish* the government. Surely equitable relief is available – despite governmental immunity – only because it does *not* constitute a punishment. So how can equitable relief in this case – i.e., an injunction against doing what is prohibited anyway – be a penalty? As with governmental immunity, so with MMMA immunity: courts retain a right to restrain nuisances and other behavior deemed legally improper. The short answer to Plaintiff-Appellee's argument that "an injunction . . . is not materially different from a misdemeanor or felony statute[,]" Plaintiff-Appellee's Brief at 22, is this: equity offers alternative remedies which may be available even when other modes of relief are unavailable. Indeed, that is what equity is.

Given that the weight of authority says injunctions are not penalties, why would the Court of Appeals (*ter Beek, supra*, at 456-457) – with no citation to supporting authority – call an injunction a "penalty?" Perhaps the answer can be found in the Court of Appeals' assertion that MMMA-compliant marijuana manufacturing is not "criminal." *Ter Beek, supra*, at 456. The immunity provided by the MMMA includes protection against the loss of any right or privilege. Perhaps the Court of Appeals believes that people who are immunized from state criminal prosecution by the MMMA actually have a *right* to pursue MMMA-compliant marijuana business. An injunction against their activities would be a penalty because it would strip them of that right.

Of course, if the Court of Appeals believes that, then the MMMA is on a collision course with the CSA, which prohibits those activities. More will be said below on that subject. Suffice it to say that this illustrates a tendency on the part of both Plaintiff-Appellee and the Court of Appeals to read things into the MMMA which are not in the actual text of the statute.[9] They find an immunity from injunctions, even though neither the term "injunction" nor any other reference to equitable relief is mentioned or implied in the MMMA's discussion of immunity. And they apparently find a right to use marijuana when no such right appears in the text. Finally, they purport to find a preemption of zoning regulations when the MMMA makes no mention of or allusion to zoning.

D. The MMMA's Silence on the Subject of Zoning Precludes a Finding that the MMMA Preempts Wyoming's Zoning Ordinance.

Zoning is a subject which looms large in the legal traditions of our communities, our state, and our nation.

> Zoning is the process whereby a community defines its essential character.

Brendale v Confederated Tribes and Bands of Yakima Indian Nation, 492 US 408, 433; 109 S Ct 2994; 106 L Ed 2d 343 (1989).

> [Z]oning . . . is perhaps "the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of

[9] Or, in some instances, they read out of the text words which actually appear there. Thus, they refer to the MMMA immunity from "civil penalty," *ter Beek, supra,* at 456; Appellee's Brief on Appeal at 22, without mentioning that every time such immunity is referenced, it is followed by the phrase "or disciplinary action by a business or occupational or professional licensing board or bureau[.]" MCLS § 333.26424(a), (b), (f), (g), and (i).

> life." *Village of Belle Terre v Boraas*, 416 US I at 13; 94 S Ct 1536, 1543 (Marshall, J., dissenting).

Young v American Mini Theatres, Inc., 427 US 50, 80; 96 S Ct 2440; 49 L Ed 2d 310 (1976) (Powell, J., concurring).

> It has long been recognized that "local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations."

Greater Bible Way Temple v City of Jackson, 478 Mich 373, 403; 733 NW2d 734 (2007), quoting *Murphy v New Milford Zoning Comm.*, 148 FSupp2d 173, 190 (D Conn, 2001), and citing numerous other sources. This Court recognized

> in *Hess v West Bloomfield Twp,* 439 Mich 550, 565; 486 NW2d 628 (1992), that by granting [local governments] the authority to promote the public health, safety, and general welfare through enactment of zoning ordinances, the Legislature was complying with the constitutional mandate to protect the environment . . . from impairment or destruction.

Burt Twp v DNR, 459 Mich 659, 665, n. 6; 593 NW2d 534 (1999).

So it is more than a little curious that the MMMA makes no mention whatsoever of zoning if, as Plaintiff-Appellee and the Court of Appeals both hold, the immunity granted by the MMMA was intended to apply to a zoning ordinance, as in the case at bar. This is especially true in light of a) this Court's observation that

> [T]he status and force of this zoning authority is enhanced by our state constitution. Const 1963, art 7, § 34 provides that statutory provisions relating to townships "shall be liberally construed in their favor[,]"

Burt, supra, at 665-666, and b) its ruling that

> [I]t is incumbent upon the [Plaintiff-Appellee] to establish a clear legislative intent to exempt . . . activities from [a] zoning ordinance.

Burt, supra, at 666. It is not enough to say that the MMMA is a comprehensive legislative scheme because

> The creation of a comprehensive regulatory scheme simply does not, standing alone, equal a grant of exclusive jurisdiction, particularly in light of [communities]' rival comprehensive regulatory power under the [MZEA].

Burt, supra, at 668.[10]

So how do Plaintiff-Appellee and the Court of Appeals deal with the task set them by this Court's decision in *Burt*? In what is beginning to seem like a pattern, they are as silent on *Burt* as the MMMA is on zoning. What makes the silence of Plaintiff-Appellee and the Court of Appeals so odd is that *Burt* is this Court's most recent opinion on the intersection between zoning ordinances and statutes other than the MZEA. As such, it is the most pertinent authority on Plaintiff-Appellee's theory that the MMMA trumps the MZEA and ordinances adopted pursuant thereto.

On second thought, maybe their silence is not so odd. *Burt* imposes on Plaintiff-Appellee the burden of showing

> a "clear expression" of legislative intent . . . to exempt [his] activities in this case from the . . . zoning ordinance.

Burt, supra, at 668. This is a difficult showing where a statute, like the MMMA,

[10] Note that the zoning statute referenced in *Burt* is actually the Township Rural Zoning Act, MCL 125.271 *et seq*, a statutory predecessor of today's MZEA.

does not address the topic of land use at all.[11] By contrast, the Department of Natural Resources, which had the job of demonstrating that "clear expression" in *Burt, supra*, had a laundry list of legislatively authorized powers and responsibilities potentially bearing on the activity under consideration in *Burt*, i.e., the construction of a public-access boat launch on the shores of Burt Lake[12]. These included

> 1) the power and jurisdiction over the management, control, and disposition of all land under the public domain;
>
> 2) [the power to] acquire, construct, and maintain . . . facilities for vessels in . . . navigable waters; and
>
> 3) [the power t]o acquire, by purchase, lease, gift, or condemnation the lands, rights of way, and easements necessary for harbors and channels[.]

Burt, supra, at 667. One might reasonably think, for example, that an agency with the power of eminent domain to acquire construction sites might be immune from zoning as to its construction projects, but this Court found otherwise. How, then, can Plaintiff-Appellee claim an exemption from the zoning ordinance in this case?

This Court offered some examples of what a clear expression of legislative intent might look like. The Legislature had, for example, explicitly exempted state licensed residential facilities from local zoning in MCL 125.286a, *Burt, supra*, at

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[11] This dispenses with Plaintiff-Appellee's position – apparently not shared by the Court of Appeals – that the MMMA is more specific than the MZEA. Appellee's Brief at 16-17. Surely it makes no sense to argue that either statute is more specific when neither so much as alludes to the subject matter of the other.

[12] *Burt, supra*, at 661.

670, which exemption lives on in MCL 125.3206. Indeed, there are a number of similar explicit exemptions in MCL 125.3205, one of which was also cited in *Burt* at 670. For that matter, the Michigan Right to Farm Act contains such an exemption. MCL 286.474(6). There is therefore little doubt what a clear expression of legislative intent to waive zoning looks like. But it does not look like anything in the MMMA.[13]

The California Supreme Court's recent decision in *City of Riverside v Inland Empire Patients Health and Wellness Center, Inc*, 56 Cal 4th 729; 300 P3d 494; 156 CalRptr 3d 409 (2013), is in some ways even more pertinent than *Burt*. *Inland Empire* dealt with a zoning ordinance provision which, for all practical purposes, was identical to the ordinance in this case; Riverside imposed a citywide ban on uses which violated federal or state law. *Inland Empire, supra*, at 496-497. The Court said that, as with the MMMA,

> Nothing in the [California Medical Marijuana Laws] expressly or impliedly limits the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medical marijuana will not be permitted to operate within its borders.

Inland Empire, supra, at 496. The Court added the sensible observation that

> [W]hile some counties and cities might consider themselves well suited to accommodating medical marijuana dispensaries, conditions in other communities might lead to the reasonable decision that such facilities . . . would present unacceptable local risks and burdens . . . . Under these circumstances, we cannot lightly assume the voters or the Legislature intended to impose a "one size fits all" policy, whereby each and every one

[13] This argument gains still more force from the fact that MCL 125.3501(4) and (5) actually mandate that cities consider compliance with Federal statutes in deciding whether to permit proposed land uses.

> of California's diverse counties and cities must allow the use of local land for such purposes.

Inland Empire, supra, at 508.

> The [California Medical Marijuana Program] has never expressed or implied any actual limitation on local land use or police power regulation of facilities used for the cultivation and distribution of marijuana. We cannot employ the Legislature's expansive declaration of aims to stretch the MMP's effect beyond a reasonable construction of its substantive provisions.

Inland Empire, supra, at 511.

Plaintiff-Appellee likes to recite election returns from the 2008 election which approved the MMMA. Appellee's Brief at 6. But there is reason to wonder whether the result would have been the same had voters known they were voting to override their own local zoning ordinances. As the California Supreme Court said, there is no warrant for lightly assuming the voters intended to impose a "one size fits all" policy on the communities of this state. Rather,

> relief in cases like this must be sought exclusively in the local city hall. There, we respectfully suggest, is the forum where counsel should make the welkin ring when they conceive that their complaining clients have been treated unfairly by a poorly considered or wisdom-wanting municipal zoning enactment.

Roberts v. City of Three Rivers, 352 Mich. 463, 467-468; 90 N.W.2d 696 (1958).

II. THE MICHIGAN MEDICAL MARIHUANA ACT DOES NOT SURVIVE SUPREMACY CLAUSE ANALYSIS.

The Supremacy Clause provides that

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Acknowledging that there cannot be a rigid formula to determine whether a state statute is pre-empted, the United State Supreme Court noted in *Hines v. Davidowitz, et al.*, 312 U.S. 52, 67; 61 S. Ct. 399; 85 L. Ed. 581 (1941):

> There is not – and from the very nature of the problem there cannot be – any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of . . . federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

[Footnote omitted.]

> The nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme federal enactments preclude enforcement of state laws on the same subject. [Footnote omitted.]

Id. at 80. As discussed in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373; 120 S.Ct. 2288; 147 L. Ed. 2d 352 (2000):

> State law is preempted when "'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines, supra , at 67.* What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects..."

The MMMA is preempted because it stands as an obstacle to the goals of the CSA.

Section 801(2) of the CSA, 21 U.S.C. § 801(2), provides as follows:

> (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial detrimental effect on the health and general welfare of the American people. (Emphasis added.)

Furthermore, Section 801a(1) of the CSA, 21 U.S.C. § 801a(1), states:

> (1) The Congress has long recognized the danger involved in the manufacture, distribution, and use of certain psychotropic substances for nonscientific and nonmedical purposes, and has provided strong and effective legislation to control illicit trafficking and to regulate legitimate use of psychotropic substances in this country.

The CSA classified marijuana and tetrahydrocannabinols as Schedule I narcotics. 21 U.S.C. § 812(c)(10), (17). The narcotics placed on Schedule I have been found to have (1) a high potential for abuse, (2) no currently accepted medical use in treatment, and (3) a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. § 812(b) In *Gonzales v Raich* 545 US 1, 27; 125 S Ct 2195; 162 L Ed 1 (2005), the U.S. Supreme Court noted that Congress

> designate[d] marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable uses.

Raich, supra at 27.

In short, Congress explicitly expressed its intention to prohibit the manufacture, distribution, possession, and use of marijuana, including for medical uses or purposes, by placing it on Schedule I and not on any other Schedule. Indeed, in the instant case, the Michigan Court of Appeals, citing *Raich* at 14, as well as 21 US § 812(b)(1), (c), wrote:

> With regard to marijuana, Congress classified the drug as a Schedule I controlled substance, meaning that Congress did not recognize an accepted medical use for the drug.

Ter Beek, supra, at 460-461.

Nevertheless, the purpose of the MMMA is to permit qualifying individuals to manufacture, possess, and use marijuana for medicinal purposes. MCL 333.26422 In particular, the MMMA allows a qualifying individual to possess up to 2.5 ounces of usable marijuana and, if the qualifying individual has not specified a caregiver, he or she is permitted to cultivate up to 12 marijuana plants. MCL 333.26424(a) Indeed, the Court of Appeals in this case, citing this Court's opinion in *People v. Kolanek*, 491 Mich 382; 817 NW2d 528 (2012) wrote:

> The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be "an effort for the health and welfare of [Michigan] citizens."

Ter Beek, supra, at 461.

The U.S. Supreme Court in *Raich, supra,* seemingly acknowledged that laws such as the MMMA were enacted because of repeated failures to remove marijuana from the CSA's Schedule I:

> The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

Raich, supra, at 14-15.

Since the original enactment of Michigan's Public Health Code, Michigan has recognized that there is no medical exception, apart from medical research, that can authorize or permit the use, possession, or manufacture of marijuana. Prior to the enactment of the MMMA, there was no conflict with the CSA in that Michigan's Public Health Code, MCL 333.7212(1)(c), like the CSA, classified marijuana as a Schedule 1 controlled substance. In fact, the MMMA itself acknowledges that "federal law currently prohibits any use of marihuana except under very limited circumstances..." MCL 333.26422(c). Yet the MMMA, at least as construed by Plaintiff-Appellee, grants Plaintiff-Appellee and others similarly situated a *right* to use marijuana medically. In short, the purpose of the MMMA is to undermine the federal CSA's prohibitions regarding the use, possession, and cultivation of marijuana. That is the clear and unambiguous message of *AT&T Mobility LLC v. Concepcion*, ____ U.S. ____; 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) for this case.

In *Concepcion,* the U.S. Supreme Court was asked to decide whether Section 2 of the Federal Arbitration Act ("FAA") (9 U.S.C. § 2), which makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract," preempted California's jurisprudential rule voiding the majority of collective-arbitration waivers in consumer contracts as unconscionable. In *Concepcion*, the Court recognized "a liberal federal policy favoring arbitration." *Id.* at 1745. However, the Ninth Circuit of the U.S. Court of Appeals, relying on the rule created by the California Supreme Court in *Discover Bank v. Superior Court*, 36 Cal.4th 148; 30

Cal.Rptr.3d 76; 113 P.3d 1100 (2005), held that arbitration clauses which do not permit class action arbitrations are unconscionable and therefore unenforceable. The *Discover Bank* rule did not entirely conflict with the FAA; it only affected arbitration provisions that do not permit class action arbitrations. But in treating the *Discover Bank* rule as a "ground . . . at law or in equity for the revocation of the Contract" under Section 2 of the FAA, the state was effectively giving consumers a right to classwide arbitration. *Concepcion, supra,* at 1750. *Concepcion* is crucial to this case, because the *Concepcion* court recognized the fundamental federal preemption problem potentially posed by the application of the CSA's state law saving clause, 21 USC 903, to the MMMA:

> [A] federal statute's [state law] saving clause " 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.' " *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.,* 524 U.S. 214, 227–228, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (quoting *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 446, 27 S.Ct. 350, 51 L.Ed. 553 (1907)).

Concepcion, supra at 1748. This is precisely the way Plaintiff-Appellee

construes Section 903.[14] See Appellee's Brief at 27. Plaintiff-Appellee is, in fact, trying to use 21 USC 903 to defeat the purpose of the CSA.

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances.

Raich, supra, at 12.

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[14] A quick reading of this section reveals that it says nothing whatsoever about marijuana, whether its use is medical or recreational. Moreover, the "Historical and Statutory Notes" attached to Section 903 reveal that this Section was adopted back in 1970, when the original CSA was adopted – See, e.g., *Gonzales v Raich,* 545 US 1, 24; 125 S Ct 2195; 162 L Ed 2d 1 (2005) – and has not been amended since. Thus, Section 903 was adopted simultaneously with Congress' decision to make marijuana a Schedule I narcotic. *Raich, supra* at 24.

Plaintiff-Appellee's disregard for the context of Section 903 extends even to the names he calls this section. Citing the reference in Justice Scalia's dissent in *Gonzales v Oregon*, 546 US 243, 289; 126 S Ct 904; 163 L Ed 2d 748 (2006) to this section as a "nonpre-emption clause", Appellee's Brief at 27, Plaintiff-Appellee apparently failed to read the entire sentence:

> and the nonpre-emption clause is embarrassingly inapplicable, since it merely disclaims field pre-emption, and affirmatively *prescribes* federal pre-emption whenever state law creates a conflict.

Gonzales, supra, at 289-290 (emphasis original).

Likewise, Plaintiff-Appellee cites *US v $79,123.49 in US Cash & Currency,* 830 F2d 94, 98 (CA 7, 1987), and *City of Hartford v Tucker*, 621 A2d 1339, 1341 (Conn, 1993) for the "anti pre-emption" label they put on this section, Appellee's Brief at 27, without seeming to notice that the Section was used in these cases to facilitate state law forfeiture of drug-related assets. In other words, the courts in those cases interpreted 21 USC 903 as permitting states to adopt additional sanctions *against* violations of the CSA. *None* of these authorities stand for the proposition Appellant urges – namely that 21 USC 903 allows states to undermine the CSA's prohibition on marijuana.

As an extension of his argument, Plaintiff-Appellee says "In our nation's so-called 'War on Drugs,' states are not permitted to fight on the other side." Appellee's Brief at 33. But if Plaintiff-Appellee's version of the MMMA is adopted, the courts of this state will be instructed to prevent local officials from assisting in the federal program of eradicating marijuana use. Indeed, if those officials merely want to rid their own communities of marijuana grow operations, they will find their state "fight[ing] on the other side."

Plaintiff-Appellee reasons that "There is no reason to conclude that Congress, in prohibiting *all* marijuana use as a matter of federal law, thereby intended to prevent states from limiting penalties [associated with marijuana manufacture and consumption] *at the state and local level*[.]" Appellee's Brief at 31. But

> Congress did not intend to enact a limited prohibition on the use of marijuana -- i.e., to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. . . . Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes.

Emerald Steel Fabricators, Inc. v Bureau of Labor & Industries, 230 P3d 518, 529 (2010).

And if Plaintiff-Appellee gets his way, the MMMA will do much more than limit penalties. It will create a *right* to use land to manufacture marijuana in violation of the CSA. If the City of Wyoming – or presumably any other Michigan community – attempts to use its zoning power under MCL 125.3407 to stop such a use, it will be blocked by the MMMA immunity provisions which prohibit a

community from "den[ying] any right or privilege . . . for the medical use of marihuana[.]" MCL 333.26424. In such a case, the only "right or privilege" the community would be denying is a putative "right" to grow and/or consume marijuana. A right, in other words, "inconsistent with the provisions of the [CSA]." If section 903 of the CSA is held to permit Plaintiff-Appellee's version of the MMMA, it will have the effect – much more certainly than in *Concepcion* – of "destroy[ing]" the statute, i.e., the CSA.

The *Concepcion* Court also held that: "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." *Concepcion, supra,* at 1753. In this case, the MMMA was enacted for the desirable reason of assisting individuals with chronic and debilitating conditions by allowing and immunizing the use, possession, and cultivation of marijuana. But because those activities are strictly prohibited by the CSA, the MMMA is preempted. Indeed, to underscore the danger to the MMMA which *Concepcion* poses, Plaintiff-Appellee and the Court of Appeals treated it as they treated *Burt, supra.* They ignored it.

Without citing it, the *Concepcion* Court followed the decision in *Michigan Canners and Freezers Association v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461; 104 S.Ct. 2518; 81 L.Ed.2d. 399 (1984). *Michigan Canners* considered this state's Agricultural and Bargaining Act, MCL 290.701, *et. seq.* in light of the federal Agricultural Fair Practices Act of 1967, 7 USC 2301, *et. seq.* that prohibited both the companies which purchase farm products and the

cooperatives and other farm groups which band together to sell to those companies from

> interfer[ing] with a [farmer's] freedom to choose whether to bring his products to market himself or to sell them through a producer's association.

Michigan Canners, supra, at 464. The Michigan Act permitted state certified associations of growers of a given crop to act as exclusive agents for all growers in marketing that crop, thereby interfering with the freedom of both individual and corporate farmers to decide how to market their crops. Thus,

> The Michigan Act . . . empowers producers' associations to do precisely what the federal Act forbids them to do.

Michigan Canners, supra at 477-478. Of course, the MMMA – especially as construed by Plaintiff-Appellee and the Court of Appeals, does exactly the same thing – it empowers marijuana users and manufacturers to do precisely what the CSA forbids. The US Supreme Court reversed the decision of this Court – recorded at 416 Mich 7086; 332 NW2d 134 (1975) – and held that the Michigan statute was pre-empted because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners, supra* at 478, citing *Hines v. Davidowitz*, 312 U.S. at 67.

Michigan Canners has, in turn, informed one state supreme court's deliberations regarding its own state's medical marijuana laws. That was the case of *Emerald Steel, supra.*[15]

The Oregon Supreme Court quickly recognized the parallels between *Emerald Steel* and *Michigan Canners*.

> The preemption issue in this case is similar to the issue in *Michigan Canners*[.] In this case [the Oregon medical marijuana statute, "OMMA" for short] affirmatively authorizes the use of medical marijuana. The [federal] Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medical purposes.

Emerald Steel, supra at 529. Given the similarities, the Court held that

> to the extent [OMMA] authorizes the use of medical marijuana, the Controlled Substances Act preempts [it.]

Emerald Steel, supra at 536.

In considering the question of federal pre-emption, the Oregon Supreme Court first analyzed the OMMA. The Court concluded that the OMMA authorizes medicinal use of marijuana both because it provides that a person with a registry identification card "may engage" in such use, and because the definition section says the holder of such a card is "authorized" to make such use of marijuana. *Emerald Steel, supra* at 525.

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[15] Whether a federal statute pre-empts a state law claim is a question of federal law.

Packowski v United Food and Commercial Worker Local 951, 289 Mich App 132; 796 NW2d 94, 99 (2010), citing *Allis Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). So there is no issue of Michigan law vs. Oregon law in this case.

Next, the Court analyzed the CSA. Quoting extensively from the US Supreme Court's opinion in *Raich*, *supra,* the Oregon Supreme Court observed that the "central objectives" of the CSA were to " 'conquer drug abuse and . . . control the . . . traffic in controlled substances.' " *Emerald Steel, supra* at 526, quoting *Raich, supra* at 12. To this end

> Congress created a comprehensive, closed regulatory regime that criminalizes the unauthorized manufacture . . . and possession of controlled substances[.]

Emerald Steel, supra at 526, citing *Raich, supra* at 13.

As part of this regime,

> Congress has classified marijuana as a Schedule I drug . . . reflect[ing] Congress's conclusion that marijuana "lack[s] any accepted medical use and [that there is an] absence of any accepted safety for use in medically supervised treatment."

Emerald Steel, supra at 527, quoting *Raich, supra* at 14.

As part of its analysis, the Court considered section 903 of the CSA, concluding that a) this supposedly anti-preemption clause calls for federal pre-emption if the "state and federal law[s] . . . 'cannot consistently stand together[,]' " *Emerald Steel* at 527, and b) the OMMA and the federal Controlled Substances Act are "logically inconsistent[.]" *Emerald Steel* at 528.

> State law stood as an obstacle to the enforcement of federal law in *Michigan Canners* because state law affirmatively authorized the very conduct federal law prohibited, as it does in this case.

Emerald Steel, supra at 529.

The plain language of the MMMA suggests that it is intended to create a right to possess, use, and cultivate marijuana by authorizing and immunizing that conduct. Indeed, Section 4 of the MMMA states, in pertinent part, as follows:

> 4.(h) Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as *allowed* under this act, or acts incidental to such use, shall not be seized or forfeited. (Emphasis added.) MCL 333.26424(h)
>
> 4.(j) A registry identification card, or its equivalent, that is issued under the laws of another state, district, territory, commonwealth, or insular possession of the United States that *allows* the medical use of marihuana by a visiting qualifying patient, or to *allow* a person to assist with a visiting qualifying patient's medical use of marihuana, shall have the same force and effect as a registry identification card issued by the department.

MCL 333.26424(j) (Emphasis added.) Section 7 of the MMMA says:

> The medical use of marihuana is *allowed* under state law to the extent that it is carried out in accordance with the provisions of this act.

MCL 333.26427(a) (Emphasis added.)

But *Michigan Canners* is clear – state law *cannot* authorize conduct that federal law prohibits. *Emerald Steel* recognized that the OMMA did exactly that, and the Court of Appeals in this case acknowledged that the MMMA does the same thing. Yet the Court of Appeals upheld the MMMA in a decision which is difficult to explain without reference to the 2008 election returns. Be that as it may, the Court failed to follow *Michigan Canners* and apparently refused even to consider *Concepcion.* That is the error which it is up to this Court to correct.

CONCLUSION

It may be possible to perform a saving construction on the MMMA which would eliminate any notion that Michigan law confers some sort of right to violate the CSA. If such a construction is not possible, the MMMA cannot survive Supremacy Clause scrutiny under *Michigan Canners* and *Concepcion*. But if it is

possible to save the MMMA, surely the surviving law would *not* include, as Plaintiff-Appellee insists that the MMMA does, a rule that *all* Michigan communities *must* accept land uses prohibited by the CSA. Surely a Supremacy Clause-compliant MMMA would not call such uses "lawful conduct" as the Court of Appeals appeared to do. And most of all, an MMMA free of the defects identified in *Michigan Canners* and *Concepcion* would not – as both Plaintiff-Appellee and the Court of Appeals claim the MMMA does – invalidate an ordinance provision which only purports to outlaw land uses which are already illegal under federal law.

Then again, maybe it is not worthwhile trying to save the MMMA. In making marijuana a Schedule 1 drug, Congress has determined that cannabis has no legitimate medical use. A law which allows doctors to "prescribe" potentially limitless amounts of marijuana for patients, and entices them to do so by offering a share of the riches associated with illegal narcotics trafficking, is obviously at odds with marijuana's Schedule 1 status. And it just as clearly frustrates the aim of federal policy in this field, i.e., to eradicate the traffic in marijuana. *Raich, supra,* at 19, n. 29. So the logical thing to do under the circumstances would be to declare the MMMA unconstitutional.

Either way, the Court of Appeals decision in this case must be reversed. The MMMA does not even purport to implicate the City's zoning powers. Even California, with its history as a pioneer in the medical marijuana field, recognizes the right and need for individual communities to decide for

themselves whether to welcome still illegal marijuana-related land uses or continue to prohibit them. Michigan communities deserve no less.

Respectfully submitted,

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Dated: August 19, 2013

EXHIBIT A

Section 3.08 District Regulations. Each district, as created in this article, shall be subject to the regulations contained in this ordinance. Uses not expressly permitted are prohibited. Uses for enterprises or purposes that are contrary to federal, state or local laws or ordinances are prohibited. Waiver uses, because of their nature, require special restrictions and some measure of individual attention in order to determine whether or not such uses will be compatible with uses permitted by right in the district and with the purposes of this ordinance. Waiver uses are therefore prohibited uses unless a waiver of such prohibition is reviewed and findings submitted by the City Planning Commission as provided in this ordinance and approved by the City Council.

EXHIBIT B

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

LINDA LOTT and ROBERT LOTT

Plaintiff/Counter-Defendants,

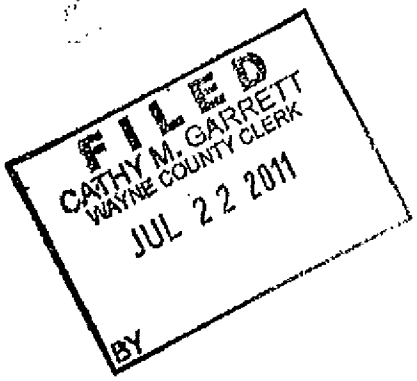
LOTT, LINDA , et al. v LIVONIA CI
Hon. Wendy M. Baxter 12/01/2010

10-013917-CZ

V

CITY OF LIVONIA and **STATE OF MICHIGAN**

Defendant/Counter-Plaintiffs.



OPINION and ORDER

GRANTING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION BASED ON MCR (C)(8) & DEFENDANT'S MOTION FOR INJUNCTIVE RELIEF

Friday, July 22, 2011

Defendant/Counter-Plaintiff, the City Of Livonia filed this Motion For Summary Disposition based on MCR 2.116 (C) 4, 8, and 10 of plaintiffs Linda Lott and Robert Lott's complaint for declaratory judgment. The Attorney General intervened as a party defendant in support of Livonia's motion. The Lotts claim that Livonia zoning ordinances place them in danger of prosecution for the use of medical marijuana approved by the Michigan Medical Marihuana Act, MCL 333.26421, *et seq* (MMMA) and requesting

injunction prohibiting the City from enforcing the ordinance. The amended complaint prays that the Court will declare Livonia's amended ordinance invalid because it exposes them to potential criminal liability as it completely eradicates the state statute. The City of Livonia claims that the Lotts have no standing, their claim is not ripe and substantively they cannot prevail due to federal pre-emption of the MMMA. The City filed a counter-complaint and requested both declaratory and injunctive relief restraining the Lotts from violating the ordinance. This Court heard arguments on the all requests for relief. After studying the applicable law, this Court finds that Plaintiffs have standing to sue Livonia, Plaintiffs' claim, is ripe for review and Livonia's motion for summary disposition is granted based on federal preemption of the MMMA. Livonia may present an injunctive order restraining violation of Section 3.08 of Article III of Ordinance No 543 as amended.

FACTS

Linda Lott suffers from multiple sclerosis, a disease she has had for 28 years. Robert Lott, her designated caregiver, has his own debilitating condition: He suffers from glaucoma. MMMA allows those who have debilitating conditions such as glaucoma and multiple sclerosis to apply for registration as a medical marijuana user. Once the qualifying person is registered the registrant may possess no more than 2.5 ounces of marijuana and designate a caregiver. A designated caregiver may maintain up to 12 marijuana plants and no more than 2.5 ounces of marijuana for each person for whom he or she is a caregiver.

Both Lotts were given written certifications by their physicians and received registration identification cards as medical marihuana users from the State of Michigan. Robert was also given a registration from the state for cultivation and possession of marihuana.

The Lotts have alleged that they own the building in Livonia at 13001 Merriman; however, they admit that they are not the owners of record but rather they are the majority stockholders of the corporation that holds title to the building. That entity is not a party to this action. Nevertheless, Robert Lott hopes to grow and keep marihuana there as a registered caregiver. The Lotts further admit that they have never applied for an ordinance waiver or zoning variance for the MMMA sanctioned use they hope to exercise at the Merriman address.

According to the Lotts, they have standing and their cause is ripe for judicial relief because they have sustained an injury in fact from Livonia's ordinances that exposes them to criminal liability. The injurious language of the Livonia ordinance, Section 3.08 of Article III of Ordinance No 543 as amended reads as follows:

> "Uses not expressly permitted are prohibited. Uses for enterprises or purposes that are contrary to federal, state or local laws or ordinance are prohibited."

Any, all and every use of marihuana is contrary to federal law. Because the federal Controlled Substance Act, 21 USCS§ 801, *et. seq* (CSA) completely criminalizes marijuana use, possession, manufacture, distribution or delivery—obliterating any and

all legitimate legal use whatsoever for marihuana -- medical or otherwise-- this puts the ordinance squarely at odds with the MMMA language found at MCL 333. 26423 (a) (1), which immunizes qualified registered patients users and caregiver growers who have been issued and possess a registry identification card from

- arrest, prosecution or penalty in any manner; and/or
- denial of any right, privilege or exposure to civil penalty; and/ or
- disciplinary action by a business, occupation, profession or licensing board, when used in accordance with the statute.

There is no provision in the zoning ordinance amendment that specifically prohibits maintaining or growing marihuana in any particular district. It merely prohibits any use that is contrary to federal law. By prohibiting any use that is contrary to federal law, and exacting a penalty for violation of the ordinance of a $100 fine and up to five days in jail for each day of the violation under the Livonia Zoning Ordinance Section 24.03, Plaintiffs claim that the amendment is in direct conflict with state law and is therefore preempted by state law. Plaintiffs request that Section 3.08 be found invalid.

The City of Livonia alleges three grounds entitling it to relief: (1) that Plaintiffs lack standing; their averment that they are the controlling stockholders of the business entity with a property interest at the Merrimen address falls short of giving them standing status, especially in light of the fact that the business is not a named party in this action: (2) that the case is not ripe due to Plaintiffs' failure to exhaust their administrative remedies; and (3) that the ordinance is a valid exercise of the

municipality's police power and Plaintiffs' complaint is based upon an "unconstitutional reading of the statute." [Defendant's Brief, p 11].

STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Livonia's motion for summary disposition pursuant to MCR 2.116(C)(4), is based on the ground that the Court lacks subject matter jurisdiction, its' MCR 2.116(C)(8) is on the ground that Plaintiffs have failed to state a claim for which relief can be granted, and its' MCR 2.116(C)(10) is on the ground that there is no genuine issue of material fact.

A motion for summary disposition brought under MCR 2.116(C) (4) tests a trial court's subject matter jurisdiction. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004). Circuit courts are courts of general jurisdiction and have original jurisdiction over all civil claims and remedies except where exclusive jurisdiction is vested in some other court or the circuit court is denied jurisdiction by constitution or statute. *Farmers Ins Exchange v South Lyon Community Schools*, 237 Mich App 235, 241; 602 NW2d 588 (1999). If it is apparent from the allegations that the matter alleged is within the class of cases over which the body has power to act, then subject matter jurisdiction exists. *Id.* The burden of proof is on the plaintiff to establish jurisdiction. *Citizens for Common Sense In Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). Additionally, when reviewing a motion under MCR 2.116(C)(4), the Court must determine whether the pleadings demonstrate that the respondent is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there is no genuine issue of material fact. *Walker v Johnson & Johnson Vision Products, Inc*, 217 Mich App 705, 708; 552 NW2d 679 (1996).

Next, MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Only the pleadings may be considered in rendering a decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130.

Finally, in reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

ANALYSIS

Standing

Defendant claims that Plaintiffs lack standing because Defendant contends the Lotts do not own a building in Livonia. In response, Plaintiffs maintain that as majority owners of a business at 13001 Merriman, which owns a building in Livonia, they do

have standing. Defendant also argues that the business entity should be joined as a necessary party pursuant to MCR 2.205 in this action and highlights that Plaintiffs refuse to reveal the name of the business.

Standing is essential to preserving the constitutional separation of power. In *Lee v Macomb Co Bd of Comm*, 464 Mich 726, 740; 629 NW2d 900 (2001)., the Michigan Supreme Court adopted the following three-part test articulated in *Lujan v Defenders of Wildlife*, 504 US 555, 559-560; 112 S Ct 2130; 119 L Ed 2d 351 (1992) that a plaintiff must meet in order to establish standing:

> First, the plaintiff must have suffered an "injury in fact"— an invasion of a legally protected interest, which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical'." Second, there must be a causal connection between the injury and the conduct complained of— the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."
>
> [Emphasis added].

Livonia claims that the first prong of this test cannot be satisfied because any injury that the Lotts seek to redress is only hypothetical and not "actual or imminent.

In *Twp of Homer v Billboards by Johnson, Inc, 268 Mich App 500, 504-505; 708 NW2d 737 (2005),* the court held that a party had standing to challenge an ordinance *after* it sought a variance when it was denied a permit upon revision of a zoning ordinance. Defendant posits that although the Lotts complain of the amended ordinance, as was the issue in the *Twp of Homer* case, they have neither sought a permit nor a variance to use, maintain or grow marihuana in the building. Thus, they

have not received a denial of the permit; consequently, an injury is not imminent, nor is it actual but rather, the Lotts have presented a mere hypothetical.

Conversely, as *Lujan, supra* held, an "injury-in-fact" can be "an invasion of a legally protected interest. Such was the case in *Warth v Seldin, 422 US 490, 500; 95 S Ct 2197; 45 L Ed 2d 343 (1975)*. The court stated that the statute itself, by its invasion of rights, can create the injury:

> The actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing...." See *Linda R S v Richard D, supra* at 617 n 3; *Sierra Club v Morton*, 405 US 727, 732 (1972).

the *Warth* court explained :

> As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf. *Baker v Carr* , 369 US 186, 204 (1962). [J]udicial power exists only to redress or otherwise to protect against injury to the complaining party...[.] A...court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action...." *Linda R S v Richard D*, 410 US 614, 617 (1973). See Data Processing Service v Camp, 397 US 150, 151-154 (1970).

In the instant case, that interest is the right given by the MMMA, to be free from criminal liability when one is in compliance with that state statute. Thus, from the perspective articulated in *Warth*, Plaintiffs have suffered an "injury-in-fact," which stems from the ordinances that would expose them to local fines, federal arrest, prosecution

and criminal liability, despite the fact that they both qualify for state immunity under the state statute. Plaintiffs inability to cloak themselves with the MMMA immunity is traceable directly to the language of the ordinance. Hence, the mere existence of the ordinance creates standing by virtue of the invasion of rights created in the MMMA; and lastly, it is indeed likely that the invasion of rights injury can be redressed in a declaratory action. Therefore, this variety of injury gives Plaintiffs standing. , since Plaintiffs have established their standing to go forward with their claim.

Ripeness and Declaratory Judgment

Defendant next challenges Plaintiffs' case on the basis that it is not ripe for review, even for declaratory relief. Though the "declaratory judgment rule is to be liberally construed to... increase access to the courts," entitlement to even declaratory judgments requires a finding that an actual controversy exists. *Recall Blanchard Committee v Secretary of State*, 146 Mich App 117, 122-123; 380 NW2d 71 (1985). Defendants posit that to be able to determine whether the Lotts sustained any injury where the ordinance makes their MMMA rights unavailable on the land they control in Livonia, they must first attempt to exercise those rights or administratively request rezoning or a use variance. Presently, Plaintiffs have not pled that they have used, grown, maintained or cultivated any marihuana in Livonia; nor have they asked Livonia for permission to do so and been denied. Defendant maintains that this case is not yet ripe for review because neither the pleadings nor the evidence indicate that Plaintiffs ever applied to the Livonia zoning authority regarding their desire to keep and cultivate marihuana plants in the building located in Livonia. Defendant reasons that plaintiffs'

failure to exhaust their administrative remedies defeats their ripeness status. *Id.*[1] Plaintiffs have simply said they are registered and certified under the MMMA to do so and they have access to an address in Livonia where they "wish" to take full advantage of their MMMA given graces but they dare not do so for fear of persecution and outright prosecution based on the offending ordinance(s).

In response Plaintiffs argue that the declaratory judgment rule is to be "liberally construed. *Recall Blanchard Committee, supra*, and that their challenge to the ordinance is a facial challenge[2]. [Plaintiffs' Response, p 18]. They claim that it would be futile to seek a variance when the ordinance is a city-wide prohibition of the use of marihuana. In essence, because of the manner in which ordinance's prohibition is written, the ordinance itself is a final decision not necessitating seeking further administrative remedies-- because none exist.

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[1]Summary disposition is appropriate when a party has failed to exhaust administrative remedies. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 157; 683 NW2d 755 (2004).

[2]"A facial challenge is one in which the complainant alleges that the very existence of a zoning ordinance or decision adversely affects and infringes upon the property values of the rights of all landowners within the governed community. *Paragon*, 452 Mich at 576.

Plaintiffs' brief in opposition to Defendant's motion contradicts itself. In one section on page 7, they state that the ordinance is "preempted by the MMMA and invalid as applied to medical marijuana patients and caregivers..." In another section, on page 18, they state that "this case is a facial challenge to the Ordinance, and facial challenges are not subject to a finality requirement." [Authorities omitted]. [Emphasis added].

"An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution."

City of Huntington Woods v City of Detroit, 279 Mich App 603, 615-616; 761 NW2d 127 (2008), explains that ripeness concerns the timing of an action. The court stated:

> The doctrine of ripeness is designed to prevent "the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Michigan Chiropractic Council, supra* at 371 n 14 (citations omitted). Hence, when considering the issue of ripeness, the timing of the action is the primary focus of concern. ...The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues." *Detroit v Michigan*, 262 Mich App 542, 550; 686 NW2d 514 (2004) (internal quotation marks and citation omitted). However, it is the purpose and intent behind the grant of declaratory relief to provide litigants with court access in order to "preliminarily determine their rights." *Id* at 551; MCR 2.605(A)(1). An actual controversy is **deemed to exist** in circumstances where declaratory relief is necessary in order to guide or direct future conduct. In such situations, courts are "'not precluded from reaching issues before actual injuries or losses have occurred.'" *Detroit, supra* at 551 (citation omitted).
>
> [Emphasis added].

Accordingly, though no arrest, prosecution or civil detriment has befallen the Lotts, an "actual controversy" is deemed to exist and not dependent upon the Lotts actualizing their MMMA permitted desires to grow and use marihuana in the future. As the *Huntington Woods* case states, the purpose of a grant of declaratory relief is to "provide litigants with court access" to "'*preliminarily* determine their rights.'" *Id.* Moreover, though no adverse action creating an actual injury transpired, such as an arrest or a

denial of a variance by the Livonia zoning authority, the court in *Recall Blanchard Committee v Secretary of State* held:

> [I]n some instances a declaratory judgment is appropriate even though actual injuries or losses have not yet occurred. **But, in such cases, an actual controversy will be found to exist only where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights.** *Shavers, supra; Bane v Pontiac Twp*, 343 Mich 481; 72 NW2d 134 (1955); *United States Aviex Co v Travelers Ins Co*, 125 Mich App 579, 585; 336 NW2d 838 (1983); *Delta County v Dep't of Natural Resources*, 118 Mich App 458, 469; 325 NW2d 455 (1982). *supra at* , 122-123.
>
> [Emphasis added].

Many cases address the issues of ripeness and futility. Among those cases are *Paragon Properties Co v City of Novi*, 452 Mich 568, 581-583; 550 NW2d 772 (1996) in which the court explained:

> The finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury . . . .
>
> *Id* at 577, fn 6.
>
> Finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance. *Beacon Hill Farm Associates v Loudoun Co Bd of Supervisors*, 875 F2d 1081 (CA 4, 1989).

Id.

In an earlier case, *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 524-525; 569 NW2d 841 (1997), the Court of Appeals held that, in the context of a facial challenge, there is no requirement that all administrative remedies must be exhausted.

> The exhaustion of remedies requirement does not apply to a facial challenge to a zoning ordinance. *Paragon Properties Co v Novi*, 452 Mich 568, 577; 550 NW2d 772 (1996); *Countrywalk Condominiums, Inc v Orchard Lake Village*, 221 Mich App 19, 22; 561 NW2d 405 (1997); *West Bloomfield Twp v Karchon*, 209 Mich App 43, 47; 530 NW2d 99 (1995). A facial challenge is one that attacks the very existence or enactment of the ordinance; it alleges that the mere existence and threatened enforcement of the ordinance adversely affects all property regulated in the market as opposed to a particular parcel. *Paragon Properties Co*, 452 Mich at 576-577; *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 72; 498 N.W.2d 1 (1993).
>
> [Emphasis added].

More recently, Michigan Supreme Court addressed the concepts of ripeness, "ostensibly" facial challenges versus as-applied challenges, finality and the futility exception in the context of zoning ordinances in *Hendee v Putnam Township*, 486 Mich 556; 756 NW2d 521 (2010). *Hendee*, is distinguishable from this matter. In *Hendee*, the plaintiffs did apply for a zoning variance and were indeed rejected, but they did not apply for the kind of variance that they asked the court to review. Under those circumstances the Supreme Court found that the *Hendee* plaintiffs had not exhausted their administrative remedies in a meaningful manner. Therefore the Supreme Court reasoned that the *Hendee* plaintiffs were not entitled to the futility exception because by failing to apply in the category of use that they offered for judicial review, they had

"deprived the township of any opportunity to consider whether its ordinance failed to accommodate a lawful use for which a demonstrated need existed[:]"

Although the language of the holding *Hendee* seems to indicate that the Lotts are required to make some attempt to obtain a variance to the zoning ordinance, a precise reading shows that the Lotts' claim is a facial challenge, not an ostensive facial challenge. *Here* there is absolutely no permitted use of marihuana in Livonia under the ordinance because it envelops the federal criminal code that prohibits any legal use of marihuana whatsoever. The language of the ordinance is "an express prohibition of a lawful land use within the ordinance itself [.]" *Id.*, at 574. Livonia's final decision on marihuana's total prohibition from any and all uses—medical, excused, immunized or otherwise--- within the city definitively exacts an actual or concrete injury ripe for judicial review. Even though it can be argued that Livonia is deprived of any opportunity to consider whether its ordinance failed to accommodate a lawful use for which a demonstrated need existed the *Hendee* court made an exception from the necessity of exhaustion of administrative remedies where there is an express prohibition in the language of the ordinance such as exist in the instant case:

> In the absence of an express prohibition of a lawful land use within the ordinance itself, the issue of the ordinance's exclusionary effect...will not be ripe for consideration by the courts until the township had been afforded the opportunity to make that determination.
>
> *Id*.

Under *Hendee,* Plaintiffs' claim is ripe where it can be established that, under no circumstances, would the ordinance permit the use: "We do not want to encourage litigation that is likely to be solved by further administrative action and we do not want to put barriers to litigation in front of litigants when it is obvious that the process down the administrative road would be a waste of time and money. *Hendee* at 568, citing *Warshak v United States*, 532 F3d 521, 529 (CA 6, 2008).

Collectively, *Paragon, Jott* and finally, the case of *Bruley v City of Birmingham*, 259 Mich App 619; 675 NW2d 910 (2004) explains the essence of this issue: Where the "mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market" the challenge is a facial one, not requiring the exhaustion of administrative remedies.

In light of this explanation, as a facial challenge to Livonia's ordinance, whether or not Plaintiffs have requested a use variance makes no difference because the ordinance itself prohibits any land use contrary to state or federal law. The *Bruley* court held:

> Here, as set out above, Bruley brought challenges to the constitutionality of the ordinance on its face, therefore, under *Paragon Properties*, finality was not required. Bruley was under no obligation to seek, and be denied, a variance from the ordinance in order to bring her suit. We conclude that for

the trial court to require that she seek "a final decision" before bringing this suit was erroneous.

[Emphasis added].

Id at 629.

Thus, any request for a variance made by Plaintiffs herein would be futile. The Livonia zoning authority would have no choice but to deny a request for a variance because federal law prohibits the possession and use of marihuana. In this case, Plaintiffs have challenged the existence of the ordinance, not how it specifically applies to them as individuals. In such a circumstance, the futility argument prevails. Therefore, because of the futility of attempting to exhaust whatever administrative remedies that may or may not be available to Plaintiffs, the instant case is, in fact, ripe for review and summary disposition on this ground is inappropriate.

The Validity of the Ordinance

Defendant's final ground for its motion for summary disposition is that the ordinance is valid and that Plaintiffs erroneously based their complaint upon an unconstitutional interpretation of the MMMA. The Court must then determine the validity of Livonia's ordinance with respect to its relationship with federal and state law.

State Law Preemption

As a general matter, zoning of land is a reasonable exercise of government police power. *Village of Euclid et al v Amber Realty Company*, 272 US 365; 387 47 S

Ct 114; 71 L Ed 303 (1926). The Michigan Zoning Enabling Act, MCL 25.3101, *et seq.* MCL 125.3201(1) provides in pertinent part:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations ... and to promote public health, safety, and welfare.

Possession, manufacture, cultivating and delivery/dispensing of marihuana are prohibited by Livonia's ordinance because the ordinance prohibits any land use which would be prohibited by state or federal law. Plaintiffs, however, argue that Livionia's ordinance is preempted by state law, specifically the MMMA. Defendant counters that the MMMA is preempted by federal law, the CSA.

State case law suggests that, if an ordinance completely eradicates the purpose of a state statute, the ordinance is deemed invalid. The *Rental Properties Association v City of Grand Rapids,* 455 Mich 246, 261-262; 566 NW2d 514 (1997) court explained the analysis it applies for determining the validity of an ordinance in light of the state statutory scheme.

> It has been held that in determining whether the provisions of a municipal ordinance conflict with a statute covering the

> same subject, the test *is whether the ordinance prohibits an act which the statute permits, or permits an act which the statute prohibits*. Accordingly, it has often been held that a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized, permitted, or required, or authorize what the legislature has expressly forbidden.
>
> * * *
>
> Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.
>
> [Emphasis added].
>
> [Italics in original].

Using the *Rental Properties'* test, Livonia's ordinance fails because it prohibits what the state permits. Thus, the MMMA and Livonia's ordinance "cannot coexist" and are "deemed inconsistent."

Even where there is no direct conflict between the two schemes of regulation, a municipality is precluded from enacting an ordinance if the ordinance is in direct conflict with the statutory scheme, or if the statutory scheme occupies the field of regulation which the municipality seeks to enter. *People v Llewellyn*, 401 Mich 314; 257 MW2d 902 (1977). The municipalities' powers to adopt regulations are always subject to the Constitution and the law. *Id.* The MMMA regulates the use, distribution, and

maintenance of medical marihuana and "occupies the field of regulation" while Livonia's ordinance directly conflicts with it because the ordinance prohibits, due to federal law, what the statute permits. Therefore, Plaintiffs are correct in their assertion that the MMMA preempts Livonia's ordinance.

Federal Law Preemption

However, the analysis does not end there: Defendant argues that although Livonia's ordinance may be invalid due to preemption by the MMMA, Livonia posits that the MMMA is itself preempted by federal law under the Supremacy Clause of the Constitution:

> Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that state laws that conflict with federal law are "without effect." *Maryland v Louisiana,* 451 US 725, 746, 101 S Ct. 2114, 68 L Ed 2d 576 (1981).

Altria Group, Inc v Good, 555 US 70; 172 L Ed 2d 398 (2008).

Defendant asserts that federal law completely proscribes possession and use of marihuana and would therefore preempt the MMMA. The Controlled Substances Act, 21 USCS § 801, *et seq* (CSA), allows dispensing of certain drugs for legitimate medical

purposes for drugs that are not Schedule I drugs: However, marihuana is a Schedule I drug . 21 USCS § 812(c). A Schedule I drug is described as follows:

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
>
> (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

These descriptions are the findings of the characteristics of Schedule I drugs or substances.[3] Hence, marihuana is found to have potential for abuse, there is no

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[3]21 USC § 841(a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Section 844 also provides in part:

> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter.

accepted medical use for it, and, even under medical supervision, it lacks safety. Therefore, a physician cannot legitimately prescribe marihuana for treatment in any circumstance. *Gonzales v Raich*, 545 US 1, 27; 125 S Ct 2195; 162 L Ed 2d (2005). One final view of the MMMA is that it supplements federal law with respect to the federal scheme in 21 USCS § 812. Under the MMMA, in order to qualify for a registration card as a person with a debilitating condition, disease, or condition, the patient's physician must provide a statement explaining the need for and use of medical marihuana for that person. This is similar to the need for written prescriptions for other drugs and medicines when medically necessary. On the other hand, the CSA completely bans the use of marihuana, with or without medical need.

One of the most instructive cases regarding a state medical marihuana statute which conflicts with the CSA, is the *Raich* case in which two California residents who used physician-recommended marijuana for serious medical conditions brought an action in US District Court for the Northern District of California. They sought injunctive and declaratory relief prohibiting the enforcement of the CSA to the extent that it prevented the patients from possessing, obtaining, or manufacturing marijuana for their personal medical use, and asserted that enforcing the CSA against the patients would

violate the Federal Constitution's commerce clause (Art. I, § 8, cl. 3) and other constitutional provisions. The Supreme Court stated:

> The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is "'superior to that of the States to provide for the welfare or necessities of their inhabitants,'" however legitimate or dire those necessities may be.... Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, see, *e.g.*, *Morrison*, 529 US, at 661-662, 146 L Ed 2d 658, 120 S Ct 1740 (Breyer, J., dissenting) (noting that 38 States requested federal intervention), so too state action cannot circumscribe Congress' plenary commerce power.
>
> [Emphasis added].
>
> *Id* at 29.
>
> [Authorities omitted].

Though the challenge in *Raich* was to the powers of the commerce clause, the challenge is nevertheless the same as any challenge to federal power. In the event of a conflict between state and federal law, the Supremacy clause clearly provides that "federal law shall prevail." *Id.*[4]

[4] See also, *Altria Group, Inc v Good*, 555 US ___; 129 S. Ct. 538, 543; 172 L. Ed. 2d 398 (2008). When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' *Rice v Santa Fe Elevator Corp*, 331 US 218, 230, 67 S Ct 1146, 91 L Ed 1447 (1947).

The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." *National League of Cities v. Usery*, 426 U.S. 833, 840, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976); see *Cleveland v. United States*, 329 U.S. 14, 19, 91 L. Ed. 12, 67 S. Ct. 13 (1946); *McCulloch, supra* at 424, 4 L. Ed. 579.

[Emphasis added].

Id at 41-42.

Thus, though *Raich* argued that Congress irrationally regulates intrastate commerce with its prohibition and the California statute allows distribution of medical marihuana, the Supreme Court still adheres to the notion that it may regulate where it deems that there is a danger of distribution on an interstate basis. [5]

5

"As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market--and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State. " *Gonzales v Raich*, 545 US 1, 40; 125 S Ct 2195; 162 L Ed 2d (2005).

Whether or not a federal statute preempts state law depends on both the language of the statute and the intent of Congress. *Gonzales v Oregon*, 546 US 243; 126 S Ct 904; 163 L Ed 2d 748 (2006) is also instructive on the issue of preemption. It analyzes whether there is federal preemption by the CSA due to Oregon's statute regulating doctors prescribing controlled substances for assisted suicide to their terminally ill patients pursuant to that states death-with-dignity law (ODWDA). The Oregon statute did not decriminalize assisted suicide; it limited the ability to conduct assisted suicide to physicians who take care of terminally ill patients and put in place a series of criteria and steps for the physicians to take before performing assisted suicide. The court explained that regulation of the practice of medicine is for the states to do and not the federal government and that the CSA does not occupy that field. The court found that the Oregon statute, therefore, did not conflict with federal law *i.e.*, the CSA which, as interpreted by Attorney General Gonzales, prohibits administering certain drugs to assist suicide because it is not a "legitimate medical purpose." The court further found that the Attorney General's interpretation of the CSA was incorrect in that the CSA in no way was intended to regulate the practice of medicine:

> Further cautioning against the conclusion that the CSA effectively displaces the States' general regulation of medical practice is the Act's pre-emption provision, which indicates that, absent a positive conflict, none of the Act's provisions should be "construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State

> law on the same subject matter which would otherwise be within the authority of the State." § 903.
>
> *Id* at 270-271.

The reasoning is persuasive, although the case not binding on the Court, in *Emerald Steel Fabricators, Inc v Bureau of Labor and Industry*, 348 Ore 159; 230 P3d 518 (2010),. The Oregon Supreme Court ruled that Oregon's medical marihuana statute, which is similar to Michigan's, is preempted by federal law. The court first addressed the CSA's preemptive effect.

> "Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that '"[t]he purpose of Congress is the ultimate touchstone" in every pre-emption case.' *Medtronic, Inc v Lohr,* 518 US 470, 485, 116 S Ct 2240, 135 L Ed 2d 700 (1996) (quoting *Retail Clerks v Schermerhorn,* 375 US 96, 103, 84 S Ct 219, 11 L Ed 2d 179 (1963)). Congress may indicate a pre-emptive intent through a statute's express language or through its structure and purpose. *See Jones v Rath Packing Co,* 430 U.S. 519, 525, 97 S Ct 1305, 51 L Ed 2d 604 (1977). Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. *Freightliner Corp v Myrick,* 514 US 280, 287, 115 S Ct 1483,. 131 L Ed 2d 385 (1995).
>
> *Id* at 172-173.

Referring to section 903[6] of the CSA, the *Emerald Steel Fabricators* court also stated:

> Under the terms of section 903, states are free to pass laws "on the same subject matter" as the Controlled Substances Act unless there is a "positive conflict" between state and federal law "so that the two cannot consistently stand together."
>
> *Id* at 175.

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[6] 21 USC § 903 provides:

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.
>
> [Emphasis added].

> In this case, ORS 475.306(1) affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, however, prohibits the use of marijuana without regard to whether it is used for medicinal purposes. As the Supreme Court has recognized, by classifying marijuana as a Schedule I drug, Congress has expressed its judgment that marijuana has no recognized medical use. See *Raich*, 545 U.S. at 14. Congress did not intend to enact a limited prohibition on the use of marijuana -- i.e., to prohibit the use of marijuana unless states chose to authorize its use for medical purposes. Cf. *Barnett Bank*, 517 U.S. at 31-35 (reaching a similar conclusion regarding the scope of the national bank act). Rather, Congress imposed a blanket federal prohibition on the use of marijuana without regard to state permission to use marijuana for medical purposes. *Oakland Cannabis Buyers' Cooperative*, 532 U.S. at 494 & n 7.
>
> [Emphasis added].
>
> *Id* at 177-178.
>
> ***
>
> [W]e need not decide whether the evidence was sufficient to prove the second criterion -- i.e., whether employee's physician monitored or oversaw employee's use of marijuana. Even if it were, the Controlled Substances Act did not authorize employee's physician to administer (or authorize employee to use) marijuana for medical purposes.

Id at 189.

Thus, the Oregon court held that, as a Schedule I drug, Congress did not intend to carve out an exception for states to enact laws permitting the use of marihuana for medical purposes.

CONCLUSION

In light of Michigan's liberal construction of the "declaratory judgment rule," and because the mere existence of the ordinance creates injury which would expose Plaintiffs to criminal liability, Plaintiffs have standing to bring this case by virtue of the invasion of rights created in the MMMA. In addition, the case is ripe for review because Plaintiffs have challenged the existence of the ordinance, not how it specifically applies to them as individuals. Therefore, it would be futile to attempt to exhaust whatever administrative remedies that may or may not be available to Plaintiffs and the instant case is ripe for review. Livonia's ordinance directly conflicts with and is preempted by the MMMA, which regulates the use, distribution, and maintenance of medical marihuana and "occupies the field of regulation." *Llewellyn, supra.* However, the MMMA is also preempted by the CSA, which completely bans the use of marihuana and bans its' use by physicians for a medical purpose. Therefore, Plaintiffs have failed to state a claim for which relief can be granted and "no factual development could possibly justify recovery." *Beaudrie, supra.* Plaintiffs' claim is legally insufficient pursuant to MCR

2.116(C)(8). Hence, Livonia's motion is granted pursuant to MCR (C)(8) and the case must be dismissed.

IT IS SO ORDERED.

HONORABLE WENDY BAXTER

CIRCUIT COURT JUDGE